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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 316 F. 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1963. A petition for rehearing was denied on May 24, 1963 (Pet. App. B). The petition for a writ of certiorari was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court properly refused to disclose the name of the confidential informant whose information that he had seen furs in the basement of petitioner's apartment was relied upon in the affidavit for a warrant to seize the furs.

2. Whether there was sufficient evidence to support the verdict.

STATUTE INVOLVED

18 U.S.C. 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial held in the United States District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging a violation of 18 U.S.C. 2315, *supra*, in that he unlawfully received, concealed and stored 81 stolen

fur pieces, which had been transported in interstate commerce and had a value in excess of $5,000, with knowledge that the furs had been stolen (R. 1, 67).[1] Petitioner was sentenced to imprisonment for a term of ten years; the trial judge, invoking the provisions of 18 U.S.C. 4208(a)(1), recommended that he be paroled after serving a minimum prison term of two years (R. 12). The court of appeals unanimously affirmed (Pet. App. A; 316 F. 2d 589).

1. Petitioner filed a pre-trial motion to suppress evidence seized from his premises under a search warrant, alleging that the supporting affidavit was inadequate in that it was not based upon the personal knowledge of the affiant but upon "unsupported hearsay" (R. 2-3). Following argument of counsel, the court found the affidavit sufficient because based on information obtained from reliable informants (Tr. 9-21). At the trial, after the government's case in chief had been presented, an evidentiary hearing on the suppression issue was held, and the motion was denied (R. 17-25). The court also denied the defense request for the names of the confidential informants whose information had been relied upon in the affidavit for the search warrant (R. 14-15, 22-24). The pertinent facts relating to these matters are as follows:

a. The affidavit for the search warrant, executed on March 22, 1962 by F.B.I. agent Marlin Moore,

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[1] "R." designates the "Appendix for Appellant" in the court of appeals which is now on file with the Clerk of this Court. "Tr." refers to the two-volume trial transcript which is lodged herewith.

stated that the agent had reason to believe that some 80 fur garments having a value of approximately $40,000, which had been stolen in Mountain Brook, Alabama, on February 10, 1962, were concealed in the basement of a single-family residence at 3117 West Jarvis Avenue, Chicago, Illinois (R. 6-7). The affidavit set forth the basis for the agent's belief in pertinent part as follows (R. 8):

> * * * a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, on March 16, 1962, that he saw approximately 75 to 80 fur garments in the basement of the home of SAMUEL RUGGENDORF at 3117 West Jarvis Avenue, Chicago, Illinois, within the past week and described these fur garments as mink, otter, and beaver jackets and stoles, the most of which were mink, and that the labels had been removed from said fur garments; further, that there were no full length coats, and that the informant had been told the furs were stolen.

The affidavit concluded that the affiant had examined reports of all fur burglaries reported to the F.B.I. exceeding $5,000 for the prior six months and that the furs described by the informant fit the description of the furs stolen on February 10, 1962, at Mountain Brook, Alabama (R. 8).[3]

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[3] The earlier portions of the affidavit stated, *inter alia*, that another confidential and reliable informant had told the F.B.I. that the fur burglary in Alabama had been committed by one Frank Schweihs and others; that other reliable informants had advised that Leo Rugendorf (petitioner's brother) was a "fence" for Schweihs; that petitioner was

b. Before the commencement of the trial, defense counsel requested the names of the informants referred to in the affidavit (R. 13-14). The government objected that if it were "to reveal the name of any informants they might and probably would be killed" (R. 15). After argument of counsel, the trial judge denied the defense motion (R. 15). Thereafter, at the evidentiary hearing on the motion to suppress, defense counsel sought to question agent Moore as to the identity of the informer who had reported seeing the furs in petitioner's basement, the place that the agent had conversed with the informer about these matters, and the date that the informer said he had seen the furs (R. 22-23). The court sustained the government's objections to these inquiries based on its claim that the answers would lead to the disclosure of the identity of the informant and to his "possible murder" (R. 23, Tr. 119). The court pointed out that "[i]f the Government ever offers that confidential informant as a witness, you will be certainly fully informed" (R. 23; see also Tr. 129).[3]

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associated in the meat business with his brother, and that Schweihs and his accomplices were "accomplished burglars who disposed of the proceeds of their burglaries" through Leo Rugendorf (R. 7-8). The affidavit further stated that Chicago police officer James Kelleher had informed the F.B.I. on or about March 1, 1962, that he had seen Schweihs at Rugendorf Brothers Meat Market, "managed by" Samuel Rugendorf (R. 7).

[3] At the hearing, petitioner sought to show factual errors in the affidavit. To this end, he called Chicago police officer Kelleher who testified that while he had informed an agent

2. The government's trial evidence showed that 81 fur pieces taken in two burglaries—one at Shreveport, Louisiana in December 1961, and the other at Mountain Brook, Alabama in February 1962—were found in a closet located in the finished basement of petitioner's one-family house on March 22, 1962. It was stipulated at the commencement of the trial that the furs found on petitioner's premises were the stolen furs and that they had a value in excess of $5,000 (R. 15). Agent Moore, who executed the search warrant on that date, stated that the furs were found hanging on individual wire hangers on a rod running the length of the closet and that one of the furs in the closet was identified by Mrs. Rugendorf as her own (R. 16, 31, Tr. 36, 55).[4] According to the agent, on the adjacent basement floor were three large white bags (about four feet deep and two feet in diameter), into which some of the seized furs were packed (R. 15-16, Tr. 52-58). The basement contained, among other things, a laundry room, a desk, telephone, card table and sewing machine (R. 16).

The defense at the trial was that neither petitioner nor his wife knew how the furs got into the basement

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of the F.B.I., on March 1, 1962, of having seen Schweihs at the Rugendorf Brothers Meat Market, he had not told the agents that the Market was managed by petitioner (R. 17; see *supra*, pp. 4-5, n. 2). Petitioner testified that he ran his own meat and grocery store; that for the past ten or eleven years he had had nothing to do with Rugendorf Brothers Meat Market; and that he had not been there for the previous four years (R. 18-20; see also R. 20-21).

[4] Mrs. Rugendorf testified at trial that while she had told the agent the fur was hers, it actually belonged to her sister-in-law (R. 36, Tr. 229).

closet or knew that they were there until they were seized by the F.B.I. Both petitioner and his wife testified that they had vacationed in Florida from February 17 until March 4 and that, from the date of their return until the execution of the warrant, they had no occasion to look into the closet (R. 30-32, 40). Mrs. Rugendorf further testified that before leaving on vacation she had taken some summer clothing out of the closet and no furs were then there (R. 31, 34); that, although she had been in the basement following the return from vacation, she had no occasion to look in the closet (R. 31; Tr. 232-233); that she had never seen the three white bags into which the agents had packed some of the furs; that these bags were found in the closet with the furs, not as Agent Moore claimed in open view on the floor of the basement (R. 33, 36; Tr. 213-215, 230-232).

Petitioner testified that he had never put the furs in the closet, did not know how they got there and did not know they were there (R. 40). Both petitioner and his wife further stated that, before going on vacation, a key to the premises had been given to petitioner's brother, Leo, and that he had never returned it (R. 30, 36, 39, 40, 45).[5] The defense attributed the presence of the furs in the basement closet to the activities of Leo (See Tr. 536-537, 545-546, 554).[6]

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[5] Three other individuals also had keys to petitioner's house at this time (R. 26-27, 30).

[6] Chicago police officer James Kelleher testified that Leo Rugendorf was known to him as a receiver of stolen property (R. 30).

In rebuttal, agent Moore again testified that, at the time of the seizure, the three white bags were found on the floor of the finished portion of the basement and not, as Mrs. Rugendorf said, in the closet with the furs (R. 39, 62). Agent Lee testified that petitioner, following his arrest, had told Lee that, shortly after his return from Florida on March 4, Leo had returned the house keys (R. 64).[1]

ARGUMENT

1. The privilege of the government to keep its sources secret and thereby encourage the steady and unimpeded flow of information necessary to effective enforcement of the criminal law yields only in the exceptional case where disclosure of an informant's identity is essential to the defense of the accused. *Roviaro* v. *United States*, 353 U.S. 53, 59-62; *Scher* v. *United States*, 305 U.S. 251; 254. This is not such a case.

a. Petitioner argues that the identity of the informant who advised agent Moore that he had seen the furs in petitioner's basement was necessary to challenge the sufficiency of the affidavit supporting the search warrant. It is, however, established that a warrant may be based on information given by in-

[1] Permeating the testimony of petitioner and his wife was the claim that the F.B.I. agents told them that if they admitted that Leo had put the furs in the basement petitioner would be set free (See *e.g.*, R. 33, 41-46). On the other hand, the agents testified that petitioner and his wife sought to place on Leo all responsibility for the furs being in the basement (R. 61-62, 63-64).

formers known to be reliable without requiring "the informants or their affidavits to be produced". *Jones* v. *United States*, 362 U.S. 257, 272. Petitioner misconceives the thrust of *Jones* in arguing that an affidavit based entirely on hearsay is insufficient to support a search warrant. While it is true that in *Jones* there was more to justify relying upon the information than the fact that the informers had given accurate information in the past, there is nothing in this Court's opinion indicating that this alone would not be a sufficient basis for finding reliability. Moreover, as the Court observed, the affidavit "rested wholly on hearsay" (362 U.S. at 269), and "hearsay may be the basis for a warrant" (*id.* at 271), "so long as a substantial basis for crediting the hearsay is presented" (*id.* at 269). Information provided by one who has provided accurate information in the past is entitled to such credit. *United States* v. *Prince*, 301 F. 2d 358, 359 (C.A. 6); cf. *Espinoza* v. *United States*, 278 F. 2d 802 (C.A. 5), certiorari denied, 364 U.S. 827.[8]

Disclosure of an informant's name is required only where it is essential to the "individual's right to prepare his defense". *Roviaro* v. *United States*, *supra*, 353 U.S. at 62. It would be particularly inappropriate to disclose the name of the informant in this case, for the right to seize property reasonably believed to be stolen does not depend on the guilt or innocence of

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[8] In this case, the affiant (F.B.I. agent Moore) swore that the confidential informant who told him of the location of the furs "has furnished reliable information in the past to the Federal Bureau of Investigation" (R. 8).

the owner of the premises where the stolen property is reportedly located. The only question with respect to the search warrant is whether there was support for the deliberate, impartial judgment of a judicial officer that there was reason to believe that stolen furs were in the basement. This decision is based upon information on which "reasonable and prudent men, not legal technicians, act". *Brinegar* v. *United States*, 338 U.S. 160, 175. The information here, coming from a man known to have been reliable in the past, coupled with the reports of known robberies involving similar furs, did furnish probable cause for a warrant to recover stolen goods. See *United States* v. *Whiting*, 311 F. 2d 191, 196 (C.A. 4), certiorari denied, 372 U.S. 935.[9]

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[9] In *Roviaro* v. *United States*, *supra*, 353 U.S. at 61, this Court observed that most of the cases involving a limitation on the informer's privilege "have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication [citations omitted]". Whatever the continuing general vitality of this language on the scope of the privilege in view of this Court's later rulings that a law enforcement officer may, without a warrant, arrest wholly on reliable hearsay (See *Draper* v. *United States*, 358 U.S. 307, 311-312; *Jones* v. *United States*, *United States*, 358 U.S. 307, 311-312; cf. *Jones* v. *United States*, *supra*, 362 U.S. at 270), it has, in any event, no bearing here since the law enforcement activity was based upon a warrant. Nor is the decision in *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7), to the contrary. There, the information provided in the affidavit was from a "stranger" to the enforcement officers who never had given reliable information in the past and, consequently, involved a situation where there was no basis for crediting the hearsay information (see 275 F. 2d at 321-323).

There is no basis for petitioner's claim that, having shown misinformation in the other portions of the affidavit, he should have been allowed to test the informer's story to show it was also erroneous. The purported false information—that the affidavit stated that Chicago police officer Kelleher had informed the F.B.I. that he had seen the person (Schweihs) suspected of the theft at Rugendorf's Brothers Meat Market, "managed by Samuel Ruggendorf" (R. 7), whereas the officer testified that he had never stated anything to the F.B.I. concerning petitioner's association with the Market (R. 17)—is not necessarily false at all. A fair reading of this portion of the affidavit does not compel the conclusion that it was officer Kelleher who informed the F.B.I. that petitioner managed the market. Beyond this, the information had nothing to do with the unequivocal statement of the informer that he had seen the furs in the basement of petitioner's home. Cf. *Chin Kay* v. *United States*, 311 F. 2d 317, 321 (C.A. 9). While the trial court may have been overly cautious in prohibiting defense counsel from asking agent Moore where he had spoken to the informant and the exact date that the informer had told him he had seen the furs (R. 22-23), the court's judgment in this regard was based on the government's fear that responses to these questions might result in disclosure of the informer's identity and his "possible murder" (R. 22). Assuming the government's right to protect the identity of the informant, it was well within the court's discretion in these circumstances to exclude

any questions, the responses to which might reasonably be considered to provide a clue to identity.

b. To the extent that petitioner's argument goes further and suggests that the identity of the informant was somehow essential to his defense at trial, it also must fail. The basic issue at trial was whether petitioner knew that stolen furs were concealed in his basement.[10] Even if, as petitioner suggests, the confidential informant might have been able to testify as to who stole the furs or how they came to rest in petitioner's basement closet, this would not go to the issue of petitioner's knowledge. In other words, this is not a case like *Roviaro, supra,* in which the informer had contrived and played a direct and prominent part in the very offense for which the accused was convicted. See, to similar effect, *Gilmore* v. *United States,* 256 F. 2d 565, 566-567 (C.A. 5). In this case, whether or not there is merit to petitioner's surmise that the informant knew of the circumstances of the theft or could reveal who put the furs in the closet, there is nothing to indicate that the informant participated in or had any relationship to the crime of which petitioner stands convicted. In this setting, the interest of the government in protect-

[10] In its charge to the jury, the trial court pointed out that the government did not have to prove "all three allegations, to wit, that the defendant did receive, conceal and store the furs" set out in the indictment. To support the conviction, the court continued, "It is sufficient if the Government proves any one of the three * * * for example, that the defendant did receive or did conceal, or did store the stolen furs, alleged in the indictment. Of course, with the element of knowledge" (Tr. 574).

ing its channels of information should override a speculative claim that an informer's possible knowledge of events preceding an accused's criminal activity requires disclosure of his identity. See *Miller* v. *United States*, 273 F. 2d 279, 280-281 (C.A. 5), certiorari denied, 362 U.S. 928; *Mosco* v. *United States*, 301 F. 2d 180, 189 (C.A. 9), certiorari denied, *sub nom. Hansen* v. *United States*, 371 U.S. 842; *Jones* v. *United States*, 271 F. 2d 494, 496, n. 3 (C.A.D.C.), certiorari denied, 362 U.S. 944; *Bruner* v. *United States*, 293 F. 2d 621, 622-623 (C.A. 5), certiorari denied, 368 U.S. 947.

3. Little need be said concerning the sufficiency of the evidence. The undisputed facts showed that 81 stolen furs of a value in excess of $5,000 were found stored in a closet in petitioner's basement[11] and that they had been there for a number of weeks prior to the seizure on March 22. The defense at trial was that these furs were placed in the closet unbeknownst to petitioner while he and his wife were on vacation (from February 17 until March 4) and that they had no occasion to look into the closet after their return home. Opposed to this was evidence that a personal fur piece was, at the time of the seizure, in the very same closet; that clothing used on the vacation had been taken from this closet; and that the furnished basement area adjacent to the closet was in general use by the occupants. Considering these factors together with testimonial conflicts that could be fairly

[11] At the outset of the trial it was stipulated that these furs had a value in excess of $5,000, had been stolen in Louisiana in December 1961 and Alabama in February 1962 (R. 15).

resolved in the government's favor—*e.g.*, that petitioner had lied when he claimed that his brother Leo never returned his house keys, and that petitioner's wife had misstated the location of the three large white bags found by the agents when they seized the furs—the jury could properly infer that petitioner knew of the presence of the recently stolen furs and that he was storing them in his closet with knowledge of their stolen character. See *Wilson* v. *United States*, 162 U.S. 613, 619-620. There is no occasion for this Court to review the concurrent findings of the courts below that the evidence supports the verdict. *Delaney* v. *United States*, 263 U.S. 586, 589-590; *United States* v. *Johnson*, 319 U.S. 503, 518.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

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